9-2009

The company and its directors as co-conspirators

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THE COMPANY AND ITS DIRECTORS AS CO-CONSPIRATORS

In *Nagase Singapore Pte Ltd v Ching Kai Huat* and *Lim Leong Huat v Chip Hup Hup Kee Construction Pte Ltd*, the High Court of Singapore affirmed the proposition that a company may, like a natural person, conspire with its director to inflict harm on a third person even if the latter is its "directing mind and will". In both cases, the courts' focus was directed at a conceptual enquiry, *ie*, whether a company, whose "mind" is the same as that of its director, could properly be said to have "combined" or "agreed" to conspire. This article argues, however, that this focus is misplaced. By focusing on the corporate form, the courts have inadvertently overlooked the policy concerns underlying the enquiry. In each case, the real issue before the court was whether there were grounds for imposing tortious liability on a director for what was essentially the company's wrongdoing (*ie*, breach of contract). For this purpose, the relevant legal principle is found in the leading decision of *Said v Butt*, which lays down the presumptive rule that a director acting on the company's behalf does not incur tortious liability if he has acted *bona fide* within the scope of his authority. Its primary concern is to enable directors and officers to discharge their duties without the burden of having to defend ill-founded suits.

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I. Introduction

1 Every law student is taught in the introductory company law class that a company is a legal entity with its own personality. From this fundamental premise springs a wealth of consequences. A company may own property, sue and be sued in its own name, enter into contracts, and generally assume responsibilities independently of its owners and controllers. Given the myriad ways in which a company asserts its separate personhood, it seems only a short and entirely logical step to conclude that a company may, like a natural person, conspire with

* The author is grateful to Professor Adrian Briggs for his helpful comments on an earlier draft of this article. All errors are the author's own.

another to inflict harm on a third person. This, indeed, was unequivocally affirmed by two recent decisions of the High Court of Singapore, *viz*, *Nagase Singapore Pte Ltd v Ching Kai Huat*[1] ("*Nagase*") and *Lim Leong Huat v Chip Hup Hup Kee Construction Pte Ltd*[2] ("*Lim Leong Huat*").

2 But in neither decision was this considered a straightforward conclusion. The complication lay in a unique feature shared by both cases, *ie*, that the alleged conspiracy was perpetrated by the company and a director who was also its alter ego. This gave rise to a *conceptual* conundrum: since the tort of conspiracy[3] requires proof of an agreement or combination, can this element realistically be established when the mind of the company is really that of its alter ego or its "directing mind and will"?[4] Or more simply, can two legal persons who share one and the same mind conspire? In *Nagase*, the High Court held that these questions presented no insuperable difficulty because the possibility of such complicity had already been implicitly accepted by the Singapore Court of Appeal in an earlier decision.[5] And in *Lim Leong Huat*, it was emphasised that the separate legal personality of the company amply justified this conclusion.[6]

3 This article contends that both *Nagase* and *Lim Leong Huat* took too narrow an approach in focusing on the tort of conspiracy. Although both decisions were right in rejecting the conceptual impediment to such liability, they did not, with respect, sufficiently address the *reasons* that would justify the imposition of tortious liability on the director. It is important to note that the conspiracies alleged in both *Nagase* and *Lim Leong Huat* related to the company's *breach of contract*.[7] This being

1 The case was decided in two judgments: see [2007] 3 SLR 265 and [2008] 1 SLR 80.

2 [2009] 2 SLR 318.

3 The tort of conspiracy comprises two forms, *viz*, simple conspiracy and conspiracy by unlawful means. Simple conspiracy is made out if two or more parties entered into an agreement or combined with the predominant intention to harm the claimant. For unlawful means conspiracy, however, it is not necessary to prove that the conspirators acted with the predominant intention to cause injury. Once the use of unlawful means is established, it suffices if the injury to the claimant is one of their intended purposes: *Quah Kay Tee v Ong & Co* [1997] 1 SLR 390 at [45]–[46]. This article is mainly concerned with the latter form of conspiracy as a breach of contract may be regarded as a form of "unlawful means" for purposes of the conspiracy tort; *cf* A Dugdale & M Jones, *Clerk and Lindsell on Torts* (Sweet & Maxwell, 19th Ed, 2006) at para 25-128.

4 *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 at 713.

5 *Chew Kong Huat v Ricwil (Singapore) Ptd Ltd* [2000] 1 SLR 385.

6 See para 17 of this article.

7 This can only be surmised in *Lim Leong Huat v Chip Hup Hup Kee Construction Pte Ltd*, the facts of which were rather sketchy. The judgment stated that the claimant had alleged that the director had conspired with the company to withhold the repayment of a loan made by the claimant to the company: see [2009] 2 SLR 318

(*cont'd on the next page*)

the case, the company's *own* liability was not in issue. Since the company contracted in its own name, the primary liability for breach resides with the company,[8] not the agent who authorised or procured it. Instead, the main issue in each case was whether there were grounds for imposing tortious liability on a director for what was essentially the company's wrongdoing. To hold that it is conceptually permissible for a company to conspire with its director does not explain *why* a director should be so liable. Some constraining principle must necessarily be at work. If it were otherwise, a director is potentially liable for tortious conspiracy every time he makes a decision on the company's behalf that results in damage to a third party. That surely cannot be right.

4 The aim of this article is to examine and clarify the basis upon which personal liability could properly be imposed on a director involved in the company's decision to breach a contract. It argues that the relevant legal principle is found in the leading decision of *Said v Butt*,[9] which lays down the presumptive rule that a director acting on the company's behalf does not incur tortious liability if he has acted *bona fide* within the scope of his authority. Its primary concern is to enable directors and officers to discharge their duties without the burden of having to defend ill-founded suits. Its protection is, however, limited to those who have acted in a *bona fide* manner within the scope of their authority. Further, its application is generally confined to instances where a director has participated in a company's *contractual* breach, and is therefore irrelevant where the director is implicated in a company's *tort*. In light of that, it is respectfully submitted that the focal points of the reasoning in both *Nagase* and *Lim Leong Huat* appear to have been somewhat misplaced. Since both decisions were concerned with a director's liability for his company's breach of contract, the rule in *Said v Butt* should have been the thrust of the legal analysis in each case. Unfortunately, the courts had, by approaching the issue as one pertaining only to legal concepts, bypassed the opportunity to expound the principle in *Said v Butt*.

II. The principle in *Said v Butt*

5 At common law, it is well settled that a director who authorises a company's breach of contract does not thereby incur tortious liability

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at [5]. Presumably, this alleged loan had arisen as a contractual arrangement, the non-repayment of which constituted a contractual breach.

8 Since the company has primary liability, it is not relevant to consider the company's vicarious liability, at least not immediately. But as we shall see in para 9 of this article, questions on the company's vicarious liability do arise if it is eventually decided that a director is a co-conspirator or had unlawfully induced the company's breach of contract.

9 [1920] 2 KB 497.

for the breach unless he has conducted himself otherwise than as the company's agent. This was established in *Said v Butt*,[10] a case in which the plaintiff alleged that the defendant, the chairman and managing director of a company, had unlawfully procured or induced the breach of a contract between the plaintiff and the company. The plaintiff had twice applied in his own name for a ticket to watch a new play at the theatre owned by the company. The company, however, had refused to sell the ticket to him as he had previously made serious and unfounded charges against the defendant and other officials of the company. As a result, the plaintiff resorted to asking a friend, one P, to buy a ticket on his behalf and P succeeded in doing so. When the plaintiff turned up at the theatre, he was ejected by the theatre's attendants acting under the defendant's instructions. On these facts, the court rejected the plaintiff's claim for wrongful inducement of breach. The ticket sale to P did not constitute a binding contract between the plaintiff and the company because the company was entitled to decide, and did make it plain, that it would not contract with the plaintiff. Nevertheless, McCardie J then went on to consider whether the plaintiff's claim could be sustained on the assumption that the contract had subsisted. The learned judge held that it could not. The governing principle stated by McCardie J was:[11]

> … that if a servant acting bona fide within the scope of his authority procures or causes the breach of a contract between his employer and a third person, he does not thereby become liable to an action of tort at the suit of the person whose contract has thereby been broken.

6 Although *Said v Butt* was concerned with a director's liability for inducing the company's breach of contract, the same principle has been applied to protect agents or directors from liability for *conspiring* with the company to breach its contracts.[12] Two reasons underpin the rule in *Said v Butt*. The first may be understood as an application of the "identification doctrine".[13] Under this doctrine, the acts of a person or persons who hold a high level of authority in the company are attributed to the company with the result that the law regards such persons as having acted *as the company*. That being the case, it is not the

10 [1920] 2 KB 497.

11 [1920] 2 KB 497 at 506. This principle cannot, however, be invoked to protect *shadow directors* as they are *not* servants of the company: see *Stocznia Gdanska SA v Latvian Shipping Co* [2001] 1 Lloyd's Rep 537.

12 *G Scammell & Naphew, Ld v Hurley* [1928] 1 KB 419; *O'Brien v Dawson* (1942) 66 CLR 18. Note, however, that Starke J had in *O'Brien v Dawson* described the allegation of a conspiracy to breach a contract as "a little whimsical" because "[a] party who breaks a contract commits an unlawful act, and those who knowingly procure its breach also commit an unlawful act whether they act in concert or not": *ibid*, (1942) 66 CLR 18 at 28.

13 *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 at 713–714; *Tesco Ltd v Nattrass* [1972] AC 153 at 170–171.

director but the company that has procured its own breach.[14] A more explicit endorsement of this line of reasoning is seen in *O'Brien v Dawson*,[15] where the High Court of Australia held, following *Said v Butt*, that a director who authorised a company's breach of contract is not, without more, liable as a co-conspirator for the breach. In an oft-cited passage, Starke J observed:[16]

> A company 'cannot act in its own person for it has no person' … So it must of necessity act by directors, managers and other agents. The company, if it were guilty of a breach of its contract in this case, acted through its director the respondent Doyle, but it is neither 'law or sense' … to say that Doyle in the exercise of his functions as a director of the company combined with it to do any unlawful act or become a joint tortfeasor. Again, it is equally fallacious to assert that Doyle knowingly procured the company to break its contract. The acts of Doyle were the acts of the company and not his personal acts which involved him in any liability to the plaintiff.

7 This line of reasoning has, however, been criticised. Dillon LJ, for instance, pointed out in *Welsh Development Agency v Export Finance Co Ltd*[17] that the attribution of an agent's acts to a company did not necessarily have the effect of absolving the agent from his *own* liability. Neil Campbell and John Armour termed this the "disattribution heresy" – for it improperly assumes that the application of the identification doctrine necessarily leads to the exclusion of the agent's personal liability.[18] In reality, the identification doctrine serves a more limited purpose:

> As a matter of precedent, the identification principle was developed solely to attribute the actions or knowledge of corporate agents to a company. The cases that developed the principle were concerned simply with whether the company was liable for some legal wrong. In none of those cases was the agent's liability in issue, and in none of them was there any suggestion that a finding of liability on the company's part necessarily excluded the agent's liability.

8 These are cogent observations. The fact that an agent is identified with the company for purposes of attributing an act or state of mind to the company is not, by itself, a sufficient reason for exonerating the agent. The attribution theory is not, therefore, a convincing justification for the rule in *Said v Butt*.

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14 *Said v Butt* [1920] 2 KB 497 at 505–506.
15 (1942) 66 CLR 18.
16 (1942) 66 CLR 18 at 32.
17 [1992] BCC 270 at 288
18 N Campbell & J Armour, "Demystifying the Civil Liability of Corporate Agents" (2003) 62 CLJ 290 at 293.

9 But there is a second reason for the rule. In *Said v Butt*, McCardie J observed that the "gravest and widest consequences"[19] would ensue if the defendant director were held liable for procuring the company's contractual breach. One such consequence would be to render the director liable for *tortious* damages which, being at large, may well exceed damages for breach of contract. Another consequence would be the unacceptable proliferation of actions. No less than three distinct causes of action would arise if the plaintiff's claim were to succeed, *viz*, an action against the company for breach of contract, a second action against the defendant in tort for procuring the company's breach, and finally, a third action against the company which would be vicariously liable for the defendant's tort.[20] The last-mentioned action would be odd, for the company is effectively liable for procuring its own breach.[21] That these are pertinent considerations suggest that the true rationale of the rule in *Said v Butt* lies essentially in *policy* considerations. In *ADGA Systems International Ltd v Valcom Ltd*,[22] a decision of the Ontario Court of Appeal, Carthy JA summed up the practical significance of *Said v Butt* in the following words:[23]

> [*Said v Butt* has] has since gained acceptance because it assures that persons who deal with a limited company and accept the imposition of limited liability will not have available to them both a claim for breach of contract against a company and a claim for tortious conduct against the director with damages assessed on a different basis. … [It] also assures that officers and directors, in the process of carrying on business, are capable of directing that a contract of employment be terminated or that a business contract not be performed on the assumed basis that the company's best interest is to pay the damages for failure to perform.

10 These observations suggest (correctly, it is submitted) that the central concern of the *Said v Butt* rule is to ensure that company directors and officers are free to make decisions on the company's behalf without the fear of improper and vexatious legal suits so long as they act in good faith in the company's interests. Such an environment is conducive, perhaps even critical, for the efficacious conduct of commerce.[24]

11 But whilst the facilitation of commerce calls for the protection of directors and officers from ill-founded claims, such protection cannot be unqualified. In particular, the pursuit of business efficacy should not undermine the cardinal principle that each person is answerable for his

19 [1920] 2 KB 497 at 504.
20 [1920] 2 KB 497 at 504.
21 See *Idoport Pty Ltd v Australia Bank Ltd* [2001] NSWSC 328 at [22].
22 (1999) 43 OR (3d) 101.
23 (1999) 43 OR (3d) 101 at 106.
24 (1999) 43 OR (3d) 101 at 104.

own wrong. For this reason, McCardie J stressed in *Said v Butt* that only a servant or agent who has acted *bona fide within the scope of his authority* would enjoy immunity from personal liability.[25] Where he does not so act, the agent is more appropriately regarded as a *stranger* to the company's deed and may therefore incur personal liability for the same. Subsequent decisions have not, however, found this exception easy to apply. But more will be said of that later.[26]

12 In Singapore, *Said v Butt* has been endorsed by the High Court in *Chong Hon Kuan Ivan v Levy Maurice*[27] ("*Chong Hon Kuan*"). Here, the plaintiff's appointment as the managing director of the company was prematurely terminated by a resolution approved by the company's board of directors at a meeting. The plaintiff thus instituted a suit against the company as well as several of its directors, alleging, *inter alia*, that the directors had conspired to induce the company's breach of contract. On the authority of *Said v Butt*, the defendant directors succeeded in striking out the pleadings on the alleged conspiracy. Significantly, the plaintiff did not seek to undermine the correctness of *Said v Butt*. Instead, the parties' arguments centred on the ambit of the rule. Citing the *obiter dicta* of Porter J in *De Jetley Marks v Greenword (Lord)*,[28] the plaintiff argued that *Said v Butt* should only apply to protect directors' deliberations *at* board meetings and not conduct undertaken *before* such meetings. Unsurprisingly, this suggestion did not find favour with the court. Such a distinction was, in Woo Bih Li J's view,[29] entirely artificial. Rather, the more pertinent question was "whether what was done by the directors was outside the scope of their office … [and] that the servant must have acted *bona fide*".[30]

13 The decision in *Chong Hon Kuan* plainly regarded the principle in *Said v Butt* to be applicable in Singapore. In deciding whether a director is liable for having conspired with his company in authorising the company's breach of a contractual obligation, the relevant question is whether the director has acted *bona fide* within the scope of his authority. A different focus was, however, endorsed in the more recent decisions of *Nagase* and *Lim Leong Huat*. In those two cases, the

25 See para 5 of this article.
26 See discussion in Part III of this article.
27 [2004] 4 SLR 801.
28 See [1936] 1 All ER 863 at 872–873: "There is force in this argument [*ie*, the rule in *Said v Butt*], and I think that directors in a board meeting could not induce or conspire to induce that meeting to break a contract – at any rate, not without malice. *But I think that some at any rate, if not all, of the directors could conspire, before the board meeting was held, to induce the board as a whole wrongfully to break a contract by dismissing one of the company's servants.* The matter, however, is a difficult one and I prefer to express no final opinion upon it." [emphasis added]
29 [2004] 4 SLR 801 at [43].
30 [2004] 4 SLR 801 at [43].

spotlight was placed largely on the conceptual possibility of finding a combination or agreement between a company and its alter ego, whilst *Said v Butt* was considered only as a subsidiary issue. The risk of such an approach lies in its tendency to encourage the same specious reasoning that underpinned the "disattribution heresy". It assumes that the attribution of a director's acts or thoughts to a company for one or some purposes necessarily has a bearing on the allocation of responsibility (as between the company and its director) in other circumstances. There is, as we have seen,[31] no basis for this assumption. Furthermore, such an approach obscures the real enquiry that should have been made, *ie*, whether germane policy reasons exist to justify the imposition of personal liability on the director.

III. The decisions in *Nagase* and *Lim Leong Huat*

14 In *Nagase*, the dispute arose out of a contract between the plaintiff and the second defendant, D Logistics Pte Ltd ("D Logistics"), under which D Logistics rendered warehousing and logistics services to the plaintiff at specified rates. Several years later, the plaintiff discovered that D Logistics had, for the larger part of their alliance, overcharged for its services. At the main trial,[32] it was established that D Logistics had imposed excessive charges by inflating both the volume and weight of the cargo stored at its warehouse.[33] That being the case, D Logistics was found to be in breach of the contract[34] and liable to repay the excess charges. But that was not the end of the matter as the plaintiff had also sought recovery from the first defendant, David Ching ("DC"), "the moving spirit and alter ego"[35] of D Logistics. The alleged basis of recovery was that D Logistics, DC and two of the plaintiff's employees had conspired to overcharge the plaintiff. On the evidence adduced, this allegation failed because the two employees were not found to have been acting in concert with DC and D Logistics. However, Judith Prakash J (the presiding judge) then proceeded to consider whether DC and

31 See para 7 of this article.

32 *Nagase Singapore Pte Ltd v Ching Kai Huat* [2007] 3 SLR 265.

33 [2007] 3 SLR 265 at [104], [111] and [154].

34 Ordinarily, a claimant who has paid in excess of contractual rates could have sought restitution for the excess charges without relying on a breach of contract. In this case, the court appeared to have assumed (perhaps on account of the plaintiff's pleadings) that the inflation of tonnage volume and weight would itself amount to a breach of the term specifying the applicable rates. Or that D Logistics owed an implied duty not to charge more than the actual tonnage volume and net weight of the cargo stored at its premises. The plaintiff appeared also to have pleaded (see [2007] 3 SLR 265 at [10]) that D Logistics had breached the implied duty to take care in the preparation of its invoices and bills so as to avoid overcharging the plaintiff. But a mere failure to exercise care would not be an adequate basis for establishing conspiracy because the tort is constituted only by intentional conduct.

35 [2007] 3 SLR 265 at [162].

D Logistics, in the absence of the employees' involvement, could be liable for having conspired to overcharge the plaintiff. Her Honour found that DC was clearly responsible for D Logistics' breaches because, as the directing mind and will of D Logistics, he must have been privy to the latter's deliberate and consistent decisions to inflate charges.[36] But while the *fact* of DC's involvement is not in doubt, Prakash J nevertheless accepted that this argument runs into a plausible *legal* objection, *ie*, whether it is conceptually permissible for a company to conspire with its alter ego. Since the plaintiff had not specifically addressed this difficulty in its submissions, Prakash J adjourned her decision until full submissions had been made on this point.

15 At the subsequent hearing,[37] Prakash J concluded that a company could in law be held to have conspired with its *sole* controlling director to injure a third person even if that director were the company's moving spirit.[38] Implicit support for this conclusion was found in *Chew Kong Huat v Ricwil (Singapore) Ptd Ltd*,[39] where the Court of Appeal upheld a finding that a company ("Sintalow") had conspired with its controlling director ("Chew") to injure the plaintiff ("Ricwil") by unlawful means. The unlawful means employed in that case involved the breach by Chew (also a director of Ricwil) of his fiduciary duties to Ricwil by diverting contracts from Ricwil to Sintalow. This result, Prakash J reasoned,[40] must be taken as a clear rejection of the conceptual objection to treating the company and its alter ego as separate persons for the purposes of conspiracy. Substantial reliance was also placed on *Taylor v Smyth*,[41] a decision of the Irish Supreme Court that categorically held that a sole controlling director could, in principle, be liable for conspiring with the company he controls.[42] At least two reasons could be discerned from McCarthy J's observations in *Taylor v Smyth*, which were cited by Prakash J with approval.[43] First, there is no logical reason why a director who is in control of a limited company should be granted immunity from suit if he has (through the company) established an arrangement that benefitted himself and the company to the detriment of others.[44] Secondly, to insist that a company could not conspire with its controlling director would lead to the invidious result that "the assets of a limited company should not be liable to answer for conspiracy where

36 [2007] 3 SLR 265 at [162].
37 [2008] 1 SLR 80.
38 [2008] 1 SLR 80 at [22].
39 [2000] 1 SLR 385.
40 [2008] 1 SLR 80 at [11] and [21].
41 [1991] 1 IR 142.
42 Citing *Belmont Finance (No 1) v Williams Furniture* [1979] Ch 250 in support: see [1991] 1 IR 142 at 165–166.
43 [2008] 1 SLR 80 at [20]–[21].
44 [1991] 1 IR 142 at 166.

its assets had been augmented as a result of the action alleged to constitute the conspiracy".[45]

16 Notably, Prakash J distinguished both *Said v Butt* and *Chong Hon Kuan* from *Nagase*. Accepting plaintiff counsel's argument (and without examining the relevant law in any detail), the learned judge held that the principle in *Said v Butt* did not apply to cases where the director had conspired by employing *illegal* means.[46] This occurred in *Nagase*, where the defendants had deliberately overcharged the plaintiff. Having been privy to these illegitimate charges, DC could not be said to have acted in a *bona fide* manner within the scope of his authority. *Chong Hon Kuan*, on the other hand, was distinguished on the ground that the conspiracy alleged therein was amongst three directors of a company and that the company was not itself an alleged party to the conspiracy.[47] That was not, therefore, a case which had specifically considered whether a single controlling director could conspire with his company. The discussion that follows will, however, attempt to demonstrate that this is a distinction without merit.[48]

17 In the subsequent decision of *Lim Leong Huat*, Andrew Ang J substantially endorsed the reasoning and outcome in *Nagase*, affirming the proposition that a company and its sole controlling director could in law be liable as co-conspirators.[49] This, in Ang J's view, is no more than a logical consequence of the elementary understanding of the company as a separate legal construct.[50] Thus, the learned judge observed:[51] "[if] the company and its controlling mind could enter into a contract of service, … there is no reason, on principle, why there cannot be a combination of the company and its controlling mind and an understanding or agreement between them to constitute a conspiracy."

18 Unlike Prakash J, however, Ang J did not think *Chong Hon Kuan* was irrelevant to the question whether a single controlling director could conspire with his company.[52] Instead, his Honour reasoned that

45 [1991] 1 IR 142 at 165. This does not seem relevant in *Nagase*, where the company's primary liability for breach of contract is not in doubt: see para 3 of this article.

46 [2008] 1 SLR 80 at [9].

47 [2008] 1 SLR 80 at [10].

48 See para 21 of this article.

49 *Lim Leong Huat v Chip Hup Hup Kee Construction Pte Ltd* [2009] 2 SLR 318 at [22] and [29]. Unlike *Nagase*, this decision was not concerned with the substantive liability of the director but with a preliminary application to amend pleadings. Nevertheless, the judgment is important for its extensive discussion on a director's liability for civil conspiracy.

50 Citing *Saloman v A Saloman & Co Ltd* [1896] AC 22 and *Catherine Lee v Lee's Air Farming Ltd* [1960] 3 WLR 758 in support: see [2009] 2 SLR 318 at [27]–[29].

51 [2009] 2 SLR 318 at [29].

52 [2009] 2 SLR 318 at [31]–[32].

since the tort of conspiracy by unlawful means does require the conspirator to have acted with the *intention to harm* the victim (though this need not be his predominant purpose), it is difficult to see how a director who has acted *bona fide* within his authority could be liable for conspiracy. This, in Ang J's view, was the position affirmed by *Chong Hon Kuan* through its endorsement of *Said v Butt*:[53]

> … *Chong Hon Kuan* could be said to have reduced the proposition in *Said v Butt* to the following – a claim of conspiracy against an individual director must fail where the director is acting *bona fide* and within the scope of his authority. *Whether the director has acted in a bona fide manner within the scope of his authority must be relevant in evaluating whether such director had the intention or purpose to injure the plaintiff.* Where a director acts bona fide within the scope of his authority but nevertheless causes damage or injury to a plaintiff, it cannot easily be said (with a view to establishing conspiracy) that he had the requisite intention or purpose to injure or damage the plaintiff. [emphasis added]

19 Framed in these terms, Ang J appears to have construed the principle in *Said v Butt* as no more than a corollary of the requirement for intention to harm. With respect, however, this appears to conflate two distinct mental elements. The *bona fide* element in *Said v Butt* is essentially concerned with the good faith of directors *in the conduct of the company's affairs*.[54] The relevant mental state is thus that which the director bears *vis-à-vis* the company (or its interests). For the tort of conspiracy, however, the requisite intention is that which the conspirator possesses towards the third party victim. Contrary to Ang J's statement above, it is not inconsistent for a director acting *bona fide* within the scope of his authority to intend the injury of a third party. *Said v Butt* was such a case. Assuming, as McCardie J did in that case,[55] that the plaintiff had a valid contract which the theatre company breached under the instruction of the defendant managing director, there could be no question that the defendant intended to injure the plaintiff by depriving him of the benefit of the contract. At the same time, the defendant was undoubtedly acting *bona fide* in protection of the company's interests.[56] Thus, to exempt the defendant from tortious liability under the principle in *Said v Butt* is not to deny that the defendant intended the plaintiff's harm, but only that the law regards it as legitimate, *for specific policy reasons*, to countenance the defendant's conduct in such circumstances.

53 [2009] 2 SLR 318 at [35].
54 *Stocznia Gdanska SA v Latvian Shipping Co* [2001] 1 Lloyd's Rep 537 at [289](c).
55 [1920] 2 KB 497 at 503.
56 [1920] 2 KB 497 at 504.

20 Nevertheless, Ang J was right in his observation that the reasoning in *Chong Hon Kuan was* relevant to the issue in *Nagase*. This observation is, however, justified by a reason different from that identified by the learned judge. At its crux, the issue in *Nagase* was whether a director should personally account for the contractual liability incurred by the company. The principle in *Said v Butt*, unequivocally adopted in *Chong Hon Kuan*, directly addresses this issue.

21 At common law, a number of English authorities[57] have long assumed that a company could conspire with its directors. Is this capacity altered just because the alleged conspiracy is that between the company and its *sole* alter ego? Plainly not. However numerous or scarce the human agents involved, the company remains an inanimate legal construct devoid of a natural mind. To say that a company could "conspire" with its directors is to *conclude* that the law *ought* to attribute liability to both the corporate entity and its human agents. This conclusion is not contingent on the number of agents involved. Nor is it relevant whether the company was sued as a co-conspirator. Viewed in this light, *Nagase* had erred in singling out the situation of a sole controlling director as one that merits special consideration.

22 Moreover, the holding that there was no conceptual impediment to the finding of a conspiracy between a company and its alter ego does not actually explain *why* it is right to impose tortious liability on a director whose conduct has already been attributed to the company. It is no answer to say that such liability is justified because the company is a separate legal person that could conspire with the director. No magic inheres in the term "legal person". The company's *persona* is a creation of the law, and its consequences determined by principles and policies. Even though the company is accorded some "human" liberties in specific contexts, such as the ability to contract and bear liability in its own name, it is clearly not equated with a natural person in all circumstances. So a director who "conspires", or more appropriately, causes a company's breach of contract is not necessarily in the same position as one who has procured another human agent's breach of contract. In each context where an attempt is made to assert or suppress the company's distinctiveness, a close scrutiny of the *underlying reasons* is called for. Like *Said v Butt*, the issue in *Nagase* could only be resolved by mediating the relevant but conflicting policy concerns.[58] In general, a director who acts on the company's behalf does not incur personal liability for the act but this protection is curtailed where a director who has not acted in a *bona fide* manner within the scope of his authority.

57 *Belmont Finance Corp Ltd v Williams Furniture Ltd* [1979] Ch 250; *Yukong Line Ltd of Korea v Rendsburg Investments Corp of Liberia (No 2)* [1998] 1 WLR 294.

58 See *Root Quality Pty Ltd v Root Control Technologies Pty Ltd* (2000) 1777 ALR 231 at [137].

Applied to the facts of *Nagase*, the crucial enquiry would simply have been whether DC, the company's alter ego, had in fact acted *bona fide* within the scope of his authority.

IV. The limits of *Said v Butt*

23 Although Prakash J had distinguished *Chong Hon Kuan* (which applied *Said v Butt*) from *Nagase*, the learned judge did nevertheless separately observe that the principle in *Said v Butt* would not have protected the defendant, DC, from personal liability because he had not acted in good faith in authorising the company's breaches. On the facts of *Nagase*, this conclusion is eminently sensible. To understand why this is so, it is necessary to examine the "bona fide within scope of authority" qualification of the *Said v Butt* rule.

24 Even though the qualification is well established, its precise meaning remains uncertain. Two particular difficulties have been encountered. The first relates to the meaning of "*bona fide*", and the second raises the question whether the "*bona fide*" and "acting within scope of authority" requirements should be construed as conjunctives or disjunctives.

A. Bona fide

25 In *Otech Pakistan Pvt Ltd v Clough Engineering Ltd*, Kan Ting Chiu J took the view that the director's "*bona fide*" is, in this context, assessed with strict reference to his office, such that:[59]

> When the allegation is that the defendant had conspired to and had induced the breach qua director, that, without more, must imply that the defendant had been acting *bona fide* and within the scope of his office. *'Bona fide' here is to be taken to mean that the defendant was acting in good faith in the discharge of his office, and not that he was acting in good faith in the action complained of; a director may believe that it is for the good of the company to breach a contract intentionally. In such a situation, the principle [in Said v Butt] would operate to defeat the claim against the defendant as a matter of law.* [emphasis added]

26 To the extent that the focus of the enquiry is on the acts committed by the defendant in his capacity as a director, it is surely correct. But the suggestion that a director who has acted in his capacity as a director must be presumed to have acted in good faith and within the scope of his duty is more obscure and, hence, less compelling. For it is entirely conceivable that a director may purport to discharge his duty as a director without also acting in good faith. This may explain why a

59 [2005] SGHC 98 at [35].

further gloss on the concept of "bona fide" was thought necessary in *Ridgeway Maritime Inc v Beulah Wings Ltd ("The Leon")*.[60] In that case, Waller J interpreted "not acting *bona fide*" to mean no more than that the director must *himself* have been guilty of some unlawful act. The learned judge reasoned as follows:[61]

> There certainly are well known circumstances in which an employee may be liable for inducing a breach of contract where the employee is himself acting unlawfully including in breach of his own contract with his employer. Mr Joseph suggested (following Clerk & Lindsell) that if the employee or director were not acting 'bona fide' then he could be liable for procuring a breach. *I find the words 'bona fide', if they are meant to add anything to acting unlawfully, quite difficult in this context.* Do they contemplate that an individual who knows that what he is doing will lead to the company being in breach of contract being somebody not acting *bona fide*? Or do the words bona fide relate to the relationship of the individual with the company *ie* if he is seeking to force the company to do something contrary to its own interests? *If the latter, I am not satisfied that without the action of the employee also being in breach of contract or legal duty to the employer, it could found an action in tort for inducing breach of contract.* [emphasis added]

27 This restrictive view is consistent with the essential rationale of the *Said v Butt* rule. A director who *knowingly* authorises the company's contractual breach should not, *for that reason alone*, be regarded as not having acted *bona fide* in the company's interests. If the law were otherwise, a director would find himself in an invidious position where he could not advance the company's interests without being placed at risk of incurring personal liability for his decision. Marshall JA makes the point forcefully in the Canadian decision *Imperial Oil Ltd v C&G Holdings Ltd*:[62]

> Where, in the opinion of a director, the interests of the company would be best served by breaking its contractual commitments, he or she is entitled, if not obliged, to cause the company to do so. The tortious act is not considered that of the individual director but of the company against whom the aggrieved party may seek remedy for breach. Therefore, the self same act knowingly and intentionally committed, which will expose a third party who was otherwise a stranger to the contract to liability for wrongful contractual interference, may not incur liability for a directors of a company. Indeed it may well be undertaken in the exercise of the director's duty.

60 [1999] 2 Lloyd's Rep 611.
61 [1999] 2 Lloyd's Rep 611 at 624.
62 (1989) 62 DLR (4th) 261 at 264.

28 If the interpretation in *The Leon* is accepted,[63] the English approach to the rule in *Said v Butt* may now be restated as follows. First, a director who authorises or procures his company's breach of contract will enjoy the protection of the *Said v Butt* rule if his decision is made with a view to promote the company's interests. Secondly, this immunity will be lost if, in doing so, he commits a breach of a personal legal or contractual duty. Such unlawful conduct may include, for instance, a breach of the director's fiduciary duty to the company, as may occur where a director has acted to advance his own or another's interests rather than the best interests of the company,[64] or where his conduct is akin to fraud.[65] By insisting on proof of some independently unlawful conduct on the part of the director, this approach precludes any attempt to affix personal liability on a director whose only wrong is having acted with malice or ill motive towards the claimant. This is consistent with the general approach in the law of tort, where malice, without more, is not a sufficient cause of action.[66] Yet another implication of this interpretation of "*bona fide*" is that a company and its directors can never be liable on account of simple conspiracy (or conspiring with the predominant intention to commit a lawful act) because a director will only be implicated if he is himself guilty of some legal wrong. Again, this appears right as it underscores the essential premise of the rule in *Said v Butt*, that mere complicity between a company and its directors is not a sufficient ground for imposing personal liability on a director.

29 The approach taken by Prakash J in *Nagase* may be understood as being consistent with that suggested by Waller J in *The Leon*. It will be recalled that in *Nagase*, the defendant director (DC) could not rely on the rule in *Said v Butt* because, having been privy to and authorised the company's deliberate overcharging, he could not be regarded as having acted *bona fide* in discharging his duties to the company. His conduct was akin to fraud[67] and hence illegal. On that count, imposing personal liability on DC was no more than an application of the principle that each individual is liable for his *own* wrong.

B. Conjunctives or disjunctives?

30 In *Chong Hon Kuan*,[68] Woo J stated that the qualification to the *Said v Butt* rule comprises conjunctives, *ie*, that a director does not incur

63 This does not appear to be settled law. Recent decisions have continued to doubt the proper meaning of the "acting bona fide within the scope of his authority" qualification: see *Reeves v Sprecher* [2008] BCC 49 at [32].

64 See *McFadden v 481782 Ontario Ltd* (1984) 47 OR (2d) 134.

65 See *Einhorn v Westmount Investments Ltd* (1970) 11 DLR (3d) 509.

66 *Allan v Flood* [1898] AC 1.

67 [1920] 2 KB 497 at [17].

68 *Chong Hon Kuan* [2004] 4 SLR 801 at [15], *per* Woo J.

personal liability if he has acted *bona fide and* done so within the scope of his authority. No particular reason was, however, cited for this view. In Australia, the (unreported) decision in *Idoport Pty Ltd v National Australia Bank Ltd*[69] ("*Idoport*") appears to support the contrary view. In that case, the plaintiffs had alleged, *inter alia*, that two companies within the same group had breached their respective contractual commitments, and that various directors of the said companies had procured these breaches. The directors pleaded *Said v Butt* in defence, to which the plaintiffs argued that this defence would only apply if the directors' conduct in procuring the company's breach fell within their actual authority but not when the authority was only of an ostensible nature.[70] The learned judge disagreed, holding that a director was entitled to the protection of the *Said v Butt* rule so long as he has acted within (actual or ostensible) authority, even if in doing so he had failed to advance the company's interests.[71] A director who has compromised the company's interests would be liable to the company for the breach of his fiduciary or corporate duties but that does not, in Einstein J's view, alter the fact that the acts of contracting and breach were those of *the company* and of it alone:[72]

> On principle and by definition *as long as the acts of such a director were acts within authority*, the director cannot be said to have acted otherwise than as the alter ego of the company on who's board he sat at the time when the material decisions were made … On principle and by definition, the director in those posited situations is simply not acting in a personal capacity or otherwise than as the alter ego of the company which is said to have engaged in the subject conduct said to constitute the tort. [emphasis added]

31 Obviously, the distinction between the conjunctive and disjunctive approaches is of significance only if one of the two requirements is absent. In a case where a director has acted *bona fide*, but outside the actual authority conferred on him by the company, he is protected by the *Said v Butt* rule under the disjunctive approach but not the conjunctive approach. However, if one understands "*bona fide*" as expounded by Waller J in *The Leon*, then this is in all likelihood a very improbable scenario because the director who has acted outside his authority is in any event in breach of his legal and/or contractual duty

69 [2001] NSWSC 328 at [65]. *Cf* the Canadian decision *Imperial Oil Ltd v C&G Ltd* (1989) 62 DLR (4th) 261 at 266, where it was suggested that personal liability does not automatically attach to the director even if it were established that he had not acted *bona fide*. Instead, liability will only be imposed "upon affirmative proof that *the dominating purpose of the director's act was aimed at depriving the aggrieved party of the benefits of the contract*." [emphasis added]

70 [2001] NSWSC 328 at [35].

71 [2001] NSWSC 328 at [65].

72 [2001] NSWSC 328 at [40].

to the company and hence not regarded as *bona fide* under Waller J's definition.

32 This then leaves just one other scenario in which the distinction between the two approaches still matters. And that is the scenario considered in *Idoport* itself, where the director has not acted *bona fide* but well within the scope of his authority.[73] As we have seen,[74] Einstein J did not think such a director should be personally liable for the company's breach. In that case, the directors' lack of *bona fides* was founded on the allegation that they had preferred the interests of other group companies to the prejudice of the company in which they were appointed directors. On these facts, the case for holding a director personally accountable for the company's breach may not have appeared overwhelming, for the mediation of the nominee director's conflicting duties is notoriously intractable. But the deficiency of the disjunctive approach is apparent on more extreme facts, such as those in *Nagase*. The director's actual authority was not in question in that case because the company was effectively controlled by DC. At all material times, the excess charges were, with DC's approval, unmistakably the acts of the company. However, it was equally clear that DC was not, in endorsing the deception, acting *bona fide*. A director such as DC should not therefore escape personal responsibility on the ground that his act was authorised by the company. This suggests, therefore, that there are occasions when a director ought to be denied the protection of the *Said v Butt* rule, regardless of whether he was acting within or outside the authority of his office.

33 What emerges from the foregoing is first, and more straightforwardly, that the "acting *bona fide* within the scope of his authority" qualifier does not comprise two *disjunctive* elements; and second, which is more significant, that the qualifier does not comprise two elements at all. At its core, the qualifier seeks to distinguish between situations where the director is acting merely as an agent of the company, and those where he is (or deemed to be) acting in his personal capacity. The notion "*bona fide*" achieves this by confining the application of *Said v Butt* to situations where the director has complied

73 This does, of course, raise a very difficult question as to whether a director who has not acted *bona fide* has thereby also acted outside the authority conferred by the company. In the *Idoport* case, Eistein J was firmly of the view that these raised two completely distinct issues, *ie*, that a breach of director's duty is a matter between the company and the director which, unlike the question of authority, has no impact on the director's authority to act on the company's behalf: see [2001] NSWSC 328 at [37]. In *Criterion Properties plc v Stratford UK LLC* [2004] 1 WLR 1846, however, Lord Scott appears to have implicitly accepted (at [31]) that a director's lack of authority may be inferred from conduct that is clearly contrary to the company's interests.

74 See para 30 of this article.

with his *personal* legal obligations. The issue of authority is one facet of such legality and thus conceptually indistinct from the "*bona fide*" requirement. Conversely, a director is not exonerated merely because his conduct has been authorised by the company, since a director who acts with due authority may nevertheless be in breach of a serious personal obligation to the company. In summary, therefore, the concept "*bona fide*" alone delineates the limits of the *Said v Butt* rule. A director who has not acted in a *bona fide* manner cannot seek refuge under the rule whether or not he has also acted in excess of authority.[75]

V. Contract *versus* Tort

34 In the interests of completeness, it is useful to note that apart from the "*bona fide*" qualification, the principle in *Said v Butt* is also limited in its application to situations involving a breach by the company of its *contractual* obligations. Where the alleged injury results from a *tort*, the principle generally does not absolve the director from liability. Such injury may arise in two ways. First, the director may himself be the perpetrator of the tort. McCardie J made it clear in *Said v Butt* that such a director remains personally liable for his *own* tort:[76]

> I abstain from expressing any opinion as to the law which may apply if a servant, acting as an entire stranger, procures his master to wrongfully break a contract with a third person. Nothing that I have said to-day is, I hope, inconsistent with the rule that a director or a servant who actually takes part in or actually authorizes such torts as assault, trespass to property, nuisance, or the like may be liable in damages as a joint participant in one of such recognized heads of tortious wrong.

35 This observation reinforces Waller J's interpretation of "*bona fide*" in *The Leon*. A director who perpetrates a tort in the course of discharging his responsibilities doubtlessly commits a legal wrong and cannot therefore be regarded as having acted *bona fide* in the company's interests. Such a director cannot escape liability by hiding behind the company.

36 Secondly, the company may itself be directly liable for a tort constituted by the acts of agents or servants who are *not* also directors of the company. Here, the governing principle is that a director is liable for the tort if he has authorised, directed or procured the same.[77] In this

75 This interpretation of the "bona fide within the scope of his authority" was raised but not considered in *Reeves v Sprecher* [2008] BCC 49.

76 [1920] 2 KB 497 at 506.

77 *C Evans & Sons Ltd v Spritebrand Ltd* [1985] 1 WLR 316; *C Gabriel Peter & Partners v Wee Chong Jin* [1998] 1 SLR 374; *TV Media Pte Ltd v De Cruz Andrea Heidi* [2004] 3 SLR 543.

context, unlike that involving the breach of a company's contract, the director's act of authorisation or procurement is a sufficient ground for imposing liability on the director. This means, in effect, that the law considers the director's involvement in the two contexts to be qualitatively distinct – a point acknowledged by Waller J in *The Leon*:[78]

> It is relatively easy to see that some complicity in the commission of the tort may and should render an individual liable, but it is certainly not right that simple complicity in a breach of contact should render that individual liable.

37 It is not hard to see why this may be so. Where an attempt is made to attribute personal liability to a director for the breach of a company's contractual undertaking, the case for a presumption against such liability is compelling because it is consistent with the ordinary incidence of the privity rule. Since a contract is made between the company and a third party, the third party's recourse in the event of breach is ordinarily limited to the company alone.[79] But a person injured by a company's *tort* is likely to be in a vastly different position. Take the stock example where a director authorises a negligent course of operation that results in the physical injury of a passer-by. Since the third party victim has not in any meaningful sense consented to deal with the company, he is a complete stranger and there is thus no obvious reason for confining responsibility to the company. On the contrary, the law's usual response in such circumstance is to attribute responsibility to all actors who are personally implicated in the tort. Unsurprisingly, therefore, attempts to extend the application of the *Said v Butt* rule to situations in which directors are allegedly involved in the company's tortious wrongdoing have largely been resisted.[80]

38 It is interesting to note that in Canada, the suggestion has been to abstract a more general principle from this divergent treatment of tort and contract cases. This was stated by Carthy JA in *ADGA Systems International Ltd v Valcom Ltd* in the following terms:[81]

> … that a jurisprudential division line might be drawn between those who contract with the company, *or voluntarily deal with it*, and can be taken to have accepted limited liability, and strangers to the company whose only concern is not to be harmed by the conduct of others. On

78 *The Leon* [1999] 2 Lloyd's Rep 611 at 624, *per* Waller J.

79 See observations of Carthy JA in *ADGA Systems International Ltd v Valcom Ltd* (1999) 43 OR (3d) 101, cited in para 9 of this article. See also *Idoport Pty Ltd v Australia Bank Ltd* [2001] NSWSC 328 at [63].

80 See the relevant discussion in *MCA Records Inc v Charly Records Ltd* [2000] EMLR 743 at [10]–[12]; and *Johnson Matthey (Aust) Ltd v Dascorp Pty Ltd* [2003] VSC 291 at [112]–[118].

81 (1999) 43 OR (3d) 101 at 107. This suggestion was first made by La Forest J in his dissent in *London Drugs Ltd v Kuehne & Nagel International Ltd* (1992) 97 DLR (4th) 261 at 290.

> that theory, those harmed as strangers to the corporate body naturally look for liability to the persons who caused the harm and those who have in some manner accepted limited liability in their dealings with the company would be limited in recourse to the company,

39 Although this suggestion has not, to this author's knowledge, been adopted in Canada, it does raise a point that merits serious consideration. If the rationale of this contract-tort divide does indeed lie in the phenomenon of assent, then the rule in *Said v Butt* should by logical extension also apply in those instances where the tort arises in the context of a consensual relationship, *eg*, where a breach of contract gives rise to concurrent actions in both contract and tort.[82] Such a development may, however, appear less attractive if the notion of consent should extend beyond contractual relations.

VI. Conclusion

40 The suggestion that a company could conspire with its directors is a tantalising one. Indeed, this brief review of the relevant case law does not dispute the possibility of such a combination. However, it is crucial to appreciate that the analysis of an alleged conspiracy between a company and its directors raises considerations that are different from that of an alleged conspiracy between human actors. The analysis in the corporate context comprises an additional and critical dimension, and that is the fair and principled allocation of responsibility between the corporate entity and the human agent. In the view of this author, this allocation can only be achieved by a careful appraisal of the relevant policy concerns. A decision that is sensitive to this reality will, by clearly articulating the interplay of such policy considerations, minimise obfuscation and promote certainty in the law.

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82 This approach may also explain *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830, where it was held that a director would not be personally liable for a company's negligent misstatement unless he had personally assumed responsibility for the same. Although the plaintiff was wronged by the company's tort (*ie*, negligent misstatement), the claim was nevertheless closely connected to a contract because the misstatement was made for the purpose of, and did succeed in, inducing, a contract. Therefore, the plaintiff had at all material times appreciated that he was dealing exclusively with the company and thus the argument for the director's complicity was much less compelling.